SUPREME COURT OF THE
STATE OF WASHINGTON
Case No. 81003-6

CAMBRIDGE TOWNHOMES, LLC, a Washington limited liability company; POLYGON NORTHWEST COMPANY, a Washington general partnership,

Respondents,

v.

P.J. INTERPRIZE, INC., a Washington corporation,

Petitioner.

RESPONDENTS' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Petitioners, P.J. Interprize, Inc., ("PJ") and Gerald Utley dba P.J. Interprize ("sole proprietorship"), seek reversal of a decision in which the Court of Appeals (1) reinstated indemnity and breach of contract claims asserted by respondents, Cambridge Townhomes, LLC, and Polygon Northwest Company (collectively "Polygon") and (2) allowed Polygon to amend its complaint to name the sole proprietorship as an additional defendant. The Court of Appeals' decision should be affirmed for several reasons.

First, the Court of Appeals correctly recognized that, because PJ was a "mere continuation" of the sole proprietorship, it could be held responsible for the sole proprietorship's obligations. Moreover, because this determination is based upon the facts existing at the time of the change in business organization, the fact that Utley filed for bankruptcy five years after incorporating PJ is simply irrelevant.

Second, the Court of Appeals appropriately determined that Polygon should be permitted to amend its complaint to add the sole proprietorship as a defendant. The sole proprietorship would not be prejudiced by such an amendment because (1) Utley was already aware of Polygon's claims against the sole proprietorship and (2) Polygon sought to impose liability on the sole proprietorship only in order to recover from its

insurers; Polygon did not seek to recover damages from the sole proprietorship itself. Moreover, Polygon's claims against the sole proprietorship are not time-barred because they relate back to the filing of Polygon's original complaint.

Third, the Court of Appeals correctly applied its earlier decision in *MacLean Townhomes, L.L.C. v. America 1st Roofing & Builders, Inc.*[1] to conclude that the indemnity provision in Polygon's contract with PJ applied to contract claims as well as tort claims.

Finally, PJ contends the Court of Appeals erred in concluding Polygon's indemnity claim had accrued. PJ did not raise this issue in the trial court at all, and it raised the issue in the Court of Appeals only in the context of whether Polygon could properly assert a post-dissolution claim against PJ—an issue that has been mooted by this Court's decision in *Ballard Square Condominium Owners Association v. Dynasty Construction Co.*[2] Thus, the issue is not properly before the Court.

In sum, the Court of Appeals' decision reinstating Polygon's claims against PJ and allowing Polygon to assert claims against the sole proprietorship should be affirmed.

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[1] *MacLean Townhomes, L.L.C. v. Am. 1st Roofing & Builders, Inc.*, 133 Wn. App. 828, 138 P.3d 155 (2006).

[2] *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 146 P.3d 914 (2006).

II. ISSUES PRESENTED FOR REVIEW

1. Can a corporation that is a mere continuation of a sole proprietorship be held liable as a successor to the sole proprietorship?

2. Does the evidence establish that PJ was a mere continuation of the sole proprietorship?

3. Does Utley's bankruptcy prevent PJ from being held liable for the sole proprietorship's defective work?

4. Will the sole proprietorship be prejudiced if the complaint is amended to add the sole proprietorship as a defendant?

5. Are Polygon's claims against the sole proprietorship time-barred, thus rendering an amendment to add the sole proprietorship futile?

6. Is Polygon's contractual right to indemnity limited to tort claims?

7. Is the issue regarding the timing of the accrual of Polygon's indemnity claim properly before the Court?

III. ARGUMENT

A. PJ can be held liable for the sole proprietorship's obligations.

PJ filed a motion for partial summary judgment in the trial court asserting it could not be held liable for work performed by its predecessor, the sole proprietorship. In response, Polygon argued PJ could be held liable pursuant to the theory of successor liability. Under this doctrine, a

corporation that purchases the assets of another corporation can be liable for the debts of the seller if, among other things, the buyer is a "mere continuation" of the seller.[3]

The trial court agreed that PJ appeared to be a mere continuation of the sole proprietorship. (10/21/05 RP at 66) However, the court ruled PJ could not be held liable for the sole proprietorship's work because of Gerald Utley's bankruptcy. (*Id.*) The Court of Appeals reversed, concluding (1) a corporation can be a mere continuation of a sole proprietorship; (2) the evidence established that PJ was a mere continuation of the sole proprietorship; and (3) Utley's bankruptcy did not preclude application of the successor liability doctrine.[4] The Court of Appeals correctly decided each of these issues, and its decision should therefore be affirmed.

1. A corporation can be a mere continuation of a sole proprietorship.

This Court has not yet specifically addressed whether the successor liability doctrine applies when a sole proprietorship converts into a

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[3] *Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp.*, 135 Wn.2d 894, 901, 959 P.2d 1052 (1998).

[4] *Cambridge Townhomes, LLC v. Pac. Star Roofing*, No. 57328-4-I, slip op. at 9-11 (Wash. Ct. App., June 11, 2007).

corporation.[5] However, courts in other jurisdictions have recognized that the rules regarding successor liability "are generally applied regardless of whether the predecessor or successor organization was a corporation or some other type of business organization."[6]

For example, in *Irby v. Davis*,[7] employees filed suit to recover unpaid compensation from their employer, a sole proprietorship. The employees argued the sole proprietorship's successor, a corporation, should be held jointly and severally liable for any judgment rendered in favor of the employees. The court agreed, concluding the "defendant cannot avoid the consequences of his errors by the simple expedient of creating another business structure."[8] The court added, "The ultimate question is one of continuity, and it is undisputed that defendant's business

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[5] *Id.* at 9.

[6] 63 AM. JUR. 2D *Products Liability* § 117 (2008); *see also Firkin v. U.S. Polychemical Corp.*, 835 F. Supp. 1048, 1051 (N.D. Ill. 1993) (composition of prior business entity has no bearing on application of successor liability doctrine); *Soo Line R.R. Co. v. B.J. Carney & Co.*, 797 F. Supp. 1472, 1482 n.4 (D. Minn. 1992) (doctrine of successor liability not limited to corporations); *Clardy v. Sanders*, 551 So. 2d 1057, 1062-63 (Ala. 1989) (corporation became successor to liabilities of predecessor sole proprietorship); *C & J Builders & Remodelers, LLC v. Geisenheimer*, 733 A.2d 193, 197 (Conn. 1999) (successor liability doctrine applies where sole proprietorship converted to limited liability company).

[7] *Irby v. Davis*, 311 F. Supp. 577 (E.D. Ark. 1970).

[8] *Id.* at 583.

is essentially unchanged as a result of incorporation."[9]

The fact that a sole proprietor may still be amenable to suit does not preclude application of the successor liability doctrine. For example, in *Tift v. Forage King Industries*,[10] a defendant corporation argued the successor liability doctrine did not apply because its predecessor, a sole proprietorship, remained available as a defendant. The court rejected that argument, explaining, "[L]ogic does not lead to the conclusion that, because [the sole proprietor] is a proper defendant, his successor business organizations cannot be also."[11] Instead, both the sole proprietorship ***and*** its successor corporation could be sued.[12]

Similarly, in *Monroe v. Interlock Steel Co.*,[13] the court concluded a corporation could be a successor of a sole proprietorship and thus could be held liable for the sole proprietorship's torts. In reaching this conclusion, the court explained, "[T]hough a sole proprietor who has transferred assets to the new corporation may be among the living, he has become akin to a predecessor corporation shorn of assets."

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[9] *Id.*

[10] *Tift v. Forest King Indus., Inc.*, 322 N.W.2d 14, 16 (Wis. 1982).

[11] *Id.* at 16.

[12] *Id.*

[13] *Monroe v. Interlock Steel Co.*, 487 N.Y.S.2d 1013 (N.Y. Sup. Ct. 1985).

The decisions cited above are in accord with Washington law. In *Gall Landau Young Construction Co. v. Hedreen*[14] the defendant corporation argued that the mere continuation theory does not apply unless only one corporation survives the transfer of assets. The court rejected this argument, noting that the cases cited by the defendant "do not support the conclusion that the dissolution of the selling corporation after the transfer of assets is a necessary finding."[15] The court also rejected the defendant's argument that successor liability did not apply because the plaintiff had other legal remedies and, in fact, had prevailed on a claim against the predecessor corporation in the predecessor's bankruptcy.[16] The court explained that there was no guarantee this remedy would provide complete relief to the plaintiff, and thus the trial court did not err in refusing to dismiss the plaintiff's successor liability claim.[17]

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[14] *Gall Landau Young Constr. Co. v. Hedreen*, 63 Wn. App. 91, 816 P.2d 762 (1991).

[15] *Gall Landau*, 63 Wn. App. at 97-98.

[16] *Id.* at 99.

[17] *Id.* at 99-100.

Similarly, in this case, Polygon has been granted permission by the bankruptcy court to proceed against the sole proprietorship's insurance proceeds. However, there is no guarantee these proceeds will be recoverable or that they will be sufficient to satisfy the sole proprietorship's obligations to Polygon. Under these circumstances, the fact that the sole proprietorship remains amenable to suit does not preclude application of the doctrine of successor liability. Instead, the issue is whether the facts establish that PJ was a mere continuation of the sole proprietorship. If it was, it can be held liable for the sole proprietorship's obligations.

2. The evidence establishes that PJ is a "mere continuation" of the sole proprietorship.

PJ argues that it cannot be a mere continuation of the sole proprietorship because there was no continuity of officers, directors, or shareholders between the two entities and because it did not purchase the sole proprietorship's assets.[18] PJ fails to recognize that the factors used to determine whether one corporation is a continuation of another corporation cannot be strictly applied when, as here, the predecessor organization is a sole proprietorship. Obviously, a sole proprietorship can ***never*** have officers, directors, or stockholders, so this requirement can

[18] Petition for Review at 12-13.

never be satisfied when a sole proprietorship converts into a corporation. Moreover, there would be no reason for a sole proprietorship to "sell" its assets to a corporation operated by the sole proprietor. Instead, the courts have looked at whether the old and new entities are engaged in the same type of business, whether the same individuals are involved, whether the successor acquired its predecessor's assets, and whether the seller continued operations initiated by its predecessor.[19]

In this case, there are numerous indicia establishing that PJ was a mere continuation of the sole proprietorship, including the fact that Utley was both the sole proprietor and the president of the corporation and that both entities performed the same work.[20] Accordingly, PJ may properly be held liable for work performed by the sole proprietorship.

3. Utley's bankruptcy does not preclude application of the successor liability doctrine.

PJ asserts it cannot be held liable for the sole proprietorship's obligations because of Utley's bankruptcy. According to PJ, application

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[19] *See, e.g., Tift*, 322 N.W.2d at 17-18; *Firkin*, 835 F. Supp. at 1050-51; *Clardy*, 551 So. 2d at 1059; *C & J Builders*, 733 A.2d at 194-95; *Monroe*, 487 N.Y.S.2d at 1014.

[20] Slip op. at 11. The trial court agreed that PJ was a mere continuation of the sole proprietorship, explaining, "[I]t's the same people and they're doing the same business, and all of this is a continuation." (10/21/05 RP at 66)

of the successor liability doctrine would conflict with bankruptcy law.[21]

PJ is wrong for two reasons. First, the determination as to whether PJ was a successor to the sole proprietorship is based upon the facts in existence at the time the sole proprietorship converted to a corporation.[22] The sole proprietorship incorporated on January 1, 1999, over five years before Utley filed for bankruptcy. PJ cites no authority for the proposition that a business organization's subsequent bankruptcy precludes, or has any effect upon, the application of the successor liability doctrine.

Second, imposing liability on PJ does not vitiate the effect of Utley's bankruptcy discharge. That is, Polygon is not seeking to recover damages from Utley.[23] Polygon is seeking to recover damages from PJ, under the theory of successor liability, and PJ did not file for bankruptcy. Whether PJ constitutes a mere continuation of the sole proprietorship simply has nothing to do with Utley's subsequent bankruptcy.

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[21] Petition for Review at 10-11.

[22] *Cf. Hall v. Armstrong Cork, Inc.*, 103 Wn.2d 258, 692 P.2d 787 (1984).

[23] Of course, the bankruptcy court specifically authorized Polygon to proceed against Utley in order to seek recovery from the sole proprietorship's insurers. *See also Arreygue v. Lutz*, 116 Wn. App. 938, 944, 69 P.3d 881 (2003) (bankruptcy discharge did not prohibit plaintiff from pursuing personal injury lawsuit against debtor to recover insurance proceeds). It also should be noted that, because the doctrine of successor liability applies to hold PJ liable for the sole proprietorship's obligations, PJ automatically succeeded to the benefits available under the sole proprietorship's insurance policies with respect to work performed by the sole proprietorship. *See N. Ins. Co. of N.Y. v. Allied Mut. Ins. Co.*, 955 F.2d 1353 (9th Cir. 1992).

B. The trial court erred in denying Polygon's motion to add the sole proprietorship as a defendant.

After the trial court erroneously concluded the successor liability doctrine did not apply, Polygon sought to amend its complaint to name the sole proprietorship as a defendant. The trial court denied Polygon's motion due to the upcoming trial date.[24] (11/22/05 RP at 20) The Court of Appeals concluded the trial court abused its discretion and that Polygon should be permitted to amend its complaint to add the sole proprietorship.[25] The Court of Appeals correctly recognized that the sole proprietorship would not be prejudiced by the amendment and that an amendment would not be futile because Polygon's claims against the sole proprietorship are not time-barred. Its decision on this issue should therefore be affirmed.

1. The sole proprietorship would not be prejudiced by the amendment.

CR 15(a) provides that leave to amend a pleading "shall be freely given when justice so requires." The Washington courts have construed this to mean that an amendment should be permitted unless it will

[24] This is obviously no longer a concern, as a new trial date will be set when the case is remanded back to the trial court for further proceedings.

[25] Slip op. at 13.

prejudice the opposing party.[26]

In this case, there can be no prejudice to the sole proprietorship if it is added as a defendant. First, Gerald Utley, the sole proprietor, has been aware of this litigation from its inception in his role as the president of PJ. Utley also has known that Polygon was seeking recovery for the sole proprietorship's defective work. Second, as the Court of Appeals correctly recognized, "Given the continuity between the sole proprietorship and the corporation, the sole proprietorship would not be prejudiced by being added as a defendant."[27] And finally, Polygon sought to name the sole proprietorship for the ***sole*** purpose of obtaining recovery from its insurers; Polygon did not (and could not) seek damages from the sole proprietorship itself.

2. Amending the complaint to name the sole proprietorship as a defendant would not be futile.

PJ and Utley assert Polygon's claims against the sole proprietorship are time-barred by RCW 4.16.326(1)(g), and thus amending

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[26] *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999) (touchstone for denial of a motion to amend is the prejudice such amendment would cause to the nonmoving party).

[27] Slip op. at 12; *see also Milner v. Nat'l Sch. of Health Tech.*, 73 F.R.D. 628, 631 (E.D. Pa. 1977) (no prejudice where plaintiff sought to add corporation as defendant to lawsuit filed against corporation's predecessor, a sole proprietorship).

the complaint to add the sole proprietorship would be futile.[28]

RCW 4.16.326(1)(g), which went into effect July 27, 2003, states:

> (1) Persons engaged in any activity defined in RCW 4.16.300 may be excused, in whole or in part, from any obligation, damage, loss, or liability for those defined activities under the principles of comparative fault for the following affirmative defenses:
>
> * * *
>
> (g) To the extent that a cause of action does not accrue within the statute of repose pursuant to RCW 4.16.310 or that an actionable cause as set forth in RCW 4.16.300 is not filed within the applicable statute of limitations. In contract actions the applicable contract statute of limitations expires, regardless of discovery, six years after substantial completion, or during the period enumerated in RCW 4.16.300, whichever is later . . . .

This statute does not preclude Polygon's claims against the sole proprietorship. First, Polygon's claims against the sole proprietorship are timely because Polygon's proposed amendment adding the sole proprietorship as a defendant relates back to the date of the original complaint—March 24, 2004, well within the six-year period following the October 1, 1999, substantial completion of Phase II of the project.[29]

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[28] Petition for Review at 14-15; Gerald Utley's Proposed Petition for Review at 12-14.

[29] *See* CR 15(c). The sole proprietorship contends the relation-back doctrine should not apply because Polygon's delay in seeking to amend the complaint to add the sole proprietorship was due to inexcusable neglect. Utley's Petition for Review at 15. "Generally, inexcusable neglect exists when no reason for the initial failure to name the party appears in the record." *S. Hollywood Hills*

Second, Polygon's claims would not be time-barred even if the relation-back doctrine did not apply. Polygon's breach of contract claim accrued, at the latest, in early 2003, when it discovered the construction defects at issue—several months before the effective date of RCW 4.16.326(1)(g).[30] (CP 456, 459) When a cause of action accrues before the enactment of a new statute of limitations, the limitations period begins to run from the effective date of the statute that makes the change.[31] Thus, the six-year contract statute of limitations did not begin to run until July 27, 2003, meaning that Polygon would have until July 27, 2009, to file suit against the sole proprietorship.

Nor would Polygon's indemnity claim against the sole proprietorship be time-barred. The six-year statute of limitations/statute of

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Citizens Ass'n for the Preservation of Neighborhood Safety & the Env't, 101 Wn.2d 68, 78, 677 P.2d 114 (1984). As explained in Polygon's answer to Utley's petition for review, Polygon's delay resulted from (1) PJ's repeated blurring of the distinction between the corporation and the sole proprietorship and (2) the trial court's erroneous conclusion that the successor liability doctrine did not apply to make PJ responsible for the sole proprietorship's obligations. *See* Answer to Gerald Utley's Proposed Petition for Review at 14-15; slip op. at 11 (describing PJ's blurring of distinction between sole proprietorship and corporation).

[30] *See 1000 Va. Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 582, 146 P.3d 423 (2006). If, as Utley asserts, the cause of action accrued October 1, 1999, it also accrued before the effective date of RCW 4.16.326(1)(g). *See* Utley's Proposed Petition for Review at 13. The statute does not apply retroactively. *1000 Va.*, 158 Wn.2d at 435-36.

[31] *Merrigan v. Epstein*, 112 Wn.2d 709, 717, 773 P.2d 78 (1989).

repose set forth in RCW 4.16.326(1)(g) applies only to contract actions, not to indemnity actions.[32] Thus, Polygon's indemnity claim was timely as long as (1) the claim accrued within six years of substantial completion, in accordance with RCW 4.16.310, and (2) Polygon filed suit within the applicable limitations period after the claim accrued.[33] PJ and Utley have not established that these requirements have not been satisfied, and thus they have not satisfied their burden of showing that Polygon's indemnity claim is time-barred.[34]

In sum, the Court of Appeals correctly recognized that Polygon should be permitted to amend its complaint to add the sole proprietorship as a defendant. The sole proprietorship would not be prejudiced by the amendment, and the claims against the sole proprietorship are not barred by either the statute of limitations of the statute of repose.

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[32] *See Cent. Wash. Refrigeration, Inc. v. Barbee*, 133 Wn.2d 509, 513, 946 P.2d 760 (1997) (although indemnity sounds in contract and tort, it is a separate equitable cause of action).

[33] *See Barbee*, 133 Wn.2d at 517 (statute of limitations begins to run on indemnity claim when party seeking indemnity pays or is legally adjudged obligated to pay damages to a third party).

[34] At the latest, Polygon's indemnity accrued by July 2004, after the HOA dismissed its lawsuit against Polygon following the parties' settlement. *See* Brief of Respondent P.J. Interprize, Inc. at 11. As discussed in Section D below, however, because PJ did not raise an issue regarding the accrual of Polygon's indemnity claim in the trial court, the record does not contain sufficient evidence for this Court to determine precisely when Polygon's indemnity claim accrued.

C. The indemnity provision in the contract between Polygon and PJ applies to the HOA's claims.

In concluding the indemnity provision in the agreement between Polygon and PJ applied to Polygon's claims for economic loss caused by a breach of contract, the Court of Appeals relied upon its earlier decision in *MacLean Townhomes, L.L.C. v. America 1st Roofing & Builders, Inc.*[35] In that case, the court construed the identical indemnity provision at issue here to include contract claims as well as tort claims.[36]

PJ contends the *MacLean Townhomes* court construed the indemnity provision in its contract too broadly, in conflict with this Court's decision in *Jones v. Strom Construction Co.*[37] However, *Jones* did not hold that broad indemnity provisions are unenforceable; it merely limited their application to "those cases in which some activity of the [indemnitor] contributed to the injury."[38]

Here, there is no allegation that the damages at issue were caused by Polygon's sole negligence. Thus, this Court's decision in *Jones* has no

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[35] *MacLean Townhomes, L.L.C. v. Am. 1st Roofing & Builders, Inc.*, 133 Wn. App. 828, 138 P.3d 155 (2006).

[36] *MacLean*, 133 Wn. App. at 834.

[37] *Jones v. Strom Constr. Co.*, 84 Wn.2d 518, 527 P.2d 1115 (1974).

[38] *Brame v. St. Regis Paper Co.*, 97 Wn.2d 748, 649 P.2d 836 (1982) (citing *Redford v. Seattle*, 94 Wn.2d 198, 205, 615 P.2d 1285 (1980)).

application. As the *MacLean* court correctly recognized, the Washington courts have not prohibited enforcement of indemnity provisions such as those at issue here, and the court did not err in concluding those provisions are not limited to tort claims.[39]

D. PJ failed to establish that Polygon's indemnity claim has not accrued.

PJ originally filed a motion for partial summary judgment in the trial court asserting the indemnity provision in its contract with Polygon applied only to tort claims and did not extend to the HOA's construction defect claims. PJ did not argue that Polygon's indemnity claim had not yet accrued, and the parties therefore did not present evidence to the trial court regarding this issue. The trial court agreed with PJ that the indemnity provision applied only to tort claims and dismissed Polygon's indemnity claim with prejudice.

On appeal, PJ argued, for the first time, that (1) Polygon had not presented any proof that it actually paid a settlement to the HOA and (2) the evidence showed Polygon did not make such a payment until after PJ's

[39] Because the Court has not identified it as an issue of concern to the Court, Polygon has not included a detailed discussion regarding the scope of the indemnity provision. Additional briefing can be found in Polygon's opening brief in the Court of Appeals at pages 11-19, at pages 4-10 of Polygon's reply brief, and at pages 18-20 of Polygon's answer to PJ's petition for review.

corporate dissolution.[40] As the Court of Appeals correctly recognized, this Court's decision in *Ballard Square Condominium Owners Association v. Dynasty Construction Co.*[41] mooted PJ's post-dissolution argument.[42] The Court of Appeals also noted, "Polygon was adjudged obligated to pay damages to the association, and its right to seek indemnity from PJ accrued at that time."[43]

In its petition for review, PJ asserted that the Court of Appeals erred in concluding (1) Polygon was "adjudged obligated to pay damages" to the HOA and (2) Polygon's indemnity claim accrued November 21, 2003, when it settled with the HOA.[44] PJ did not, however, explain the effect of these alleged errors or why the Court should consider this issue.

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[40] The evidence submitted by PJ in support of this assertion had not been presented to the trial court, and the Court of Appeals thus granted Polygon's motion to strike that evidence. This evidence included copies of (1) the December 22, 2003, complaint filed against Polygon by the HOA; (2) the July 27, 2004, stipulated order dismissing the complaint as a result of the parties' settlement; and (3) the November 29, 2005 complaint filed by Polygon against the sole proprietorship.

[41] *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 146 P.3d 914 (2006).

[42] Slip op. at 6. Under *Ballard Square*, Polygon's suit was timely as long as it was filed within two years after PJ's dissolution. Polygon filed its lawsuit two ***days*** after PJ's dissolution.

[43] *Id.* at 7.

[44] Petition for Review at 15.

In light of the *Ballard Square* decision, the date of the accrual of Polygon's indemnity claim is relevant only to determining whether the claim is barred by the statute of limitations or the statute of repose. Accordingly, PJ bore the burden of presenting evidence on this issue; and PJ failed to meet this burden.[45] In particular, PJ presented no evidence or argument to the trial court to show that Polygon's indemnity claim did not accrue before the expiration of the six-year statute of repose on October 1, 2005.[46] Nor did PJ present evidence to show that Polygon failed to file suit within the applicable statute of limitations period following the accrual of its indemnity claim. Accordingly, there is no basis for the Court to conclude that Polygon's indemnity claim is time-barred.

IV. CONCLUSION

For the reasons set forth above, Polygon respectfully requests that the Court AFFIRM the Court of Appeals decision.

DATED this 25th day of August, 2008.

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[45] *See, e.g., Haslund v. City of Seattle*, 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976).

[46] In fact, as noted above, Polygon's indemnity claim accrued November 21, 2003, when it settled with the HOA. *See Parkridge Assocs., Ltd. v. Ledcor Indus., Inc.*, 113 Wn. App. 592, 603-04, 54 P.3d 225 (2002).

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 25th day of August, 2008, I caused to be served this document to:

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I declare under penalty of perjury under the laws of the State of Washington this 25th day of August, 2008, at Seattle, Washington.

Kim Fergin